the welfare of the scholars, and the authority of the master. By common consent and by the universal custom in our New England schools, the master has always been deemed to have the right to punish such offenses. Such power is essential to the preservation of order, decency, decorum, and good government in school."

A rule against truancy is a reasonable rule: *King* v. *Jefferson City*, 71 Mo. 628; 36 Am. Rep. 499; *Burdick* v. *Babcock*, 31 Iowa, 562, 567. The supervision and control of the master over the scholar extends from the time he leaves home to attend school till he returns home from school, especially where the offense has a direct and immediate tendency to injure the school and bring the master's authority into contempt: *Lander* v. *Seaver*, 32 Vt. 114. In *Balding* v. *State*, *supra*, it is held that the teacher may require preparation of lessons at home by the pupil. The authority and control of the teacher over the pupil, outside of the school-room, is tersely stated by the Supreme Court of Missouri, as follows: "If the effect of acts done out of the school-room, while the pupils are returning to their homes, and before parental control is resumed, reach within the school-room, and are detrimental to good order and the best interests of the school, no good reason is perceived why such acts may not be forbidden and punishment inflicted on those who commit them:" *Deskins* v. *Gose*, 85 Mo. 485; s. c. 55 Am. Rep. 387.

B. E. BLACK.

St. Louis, Mo.

Court of Chancery of New Jersey.

WESTCOTT *v.* MIDDLETON.

The burden of showing that an undertaker's establishment, in which he keeps coffins, ice-boxes, and cases in which he preserves the bodies of the dead, and in the rear of which he cleanses and dries such boxes, is a nuisance, is on the complainant.

Such an establishment in a populous place is not a nuisance.

That a single person of a most sensitive taste on the subject is seriously disturbed thereby, and no others are called who have been annoyed, a case is not made requiring the interference of the court.

Physical discomfort arising from a morbid taste or an excited imagination, as distinguished from such discomfort arising through the organs of sense common to all, is not enough to justify the court in closing such an establishment.

(*Syllabus by the Court.*)

BILL for permanent injunction.

J. J. Crandall, for complainant.

E. A. Armstrong, for defendant.

BIRD, V. C.—The parties to this controversy own adjoining lots in the city of Camden. The complainant occupies his as a dwelling-house and for offices. The defendant occupies the

basement and first floor of his dwelling to carry on the business of an undertaker, using the front room as an office, the second room as a place to keep supplies, and the second and third stories with his family. On the lot of the defendant, back of the first and second rooms, is a kitchen or extension, between which and the lot of the defendant is an open space going back to the rear of the lot, which is 180 feet deep. In this open space is a hydrant. The cellar of the defendant is used for storing lumber, which, as occasion requires, he takes out in the rear, through this open space, to a shop which is at the extreme rear end of his lot, there to be used in making boxes. The complaint is that the defendant is guilty of maintaining a nuisance in the maintenance of this business of undertaking, and that the complainant is entitled to the aid of this court in being relieved therefrom. There is a charge that the defendant disturbs the complainant in the manufacture of boxes. This point is practically abandoned. But the complainant insists, in the first place, that this business is carried on in an unlawful manner; and, in the second place, that the defendant has no right to carry on this business where he does. The proof shows that the defendant buries from 100 to 150 persons a year, and the vehicles which he uses for that purpose are driving to and from his place of residence about four times in every case; so that from five to six hundred times during the year the complainant has the opportunity, if he attends thereto, to be reminded that death has taken place, that some one is a corpse, and that preparations are being made for the funeral; or that some one has just been buried. In every such case the defendant uses a large box in which the corpse is preserved, as far as possible, from decomposition, by use of ice in another box, made of tin, which is placed directly over the corpse. Formerly the tin box opened underneath, by a tube running down through the box containing the body, to carry off the water as the ice melted. This is now dispensed with, so that there is no connection whatsoever between the ice and the corpse. These boxes which are so used to preserve the body are taken, after the burial, to the residence of the defendant, through his office and store to the rear thereof; and in this narrow space, by the side of the hydrant, are often washed, and, if not washed there, are washed further back in

the yard. They have been allowed to remain there for an hour, and sometimes longer; occasionally all night. The complainant insists that he has several times noticed offensive odors from those boxes, which have greatly distressed him, and given him alarm. Indeed, it may be said that there is no doubt but that the complainant has been frequently exercised in his mind on account of the presence of these boxes, which have been receptacles of the dead; nor is there any doubt but that he has observed offensive odors, but whether from these boxes or not is not so clear to my mind. There were odors arising from that locality, but the defendant insists that they came from a drain which he found to be choked up on two occasions, and that after the drain had been opened and cleansed there were no longer any odors. The complainant insists that these odors were of the character that he says they were, because flies were attracted there in great numbers, among which was what is known as the blow-fly, which is supposed, according to the testimony, more likely to be attracted to places where there is animal decomposition than the ordinary fly.

The defendant admits the use of his premises for the purposes alleged in the bill. He also admits placing the boxes referred to immediately in the rear of the main part of his house, and by the hydrant in question, and of cleansing them there; but he insists that they were never allowed to remain there any longer than was necessary before they were thoroughly cleansed and dried, and, when cleansed and so dried, were immediately taken away and put under cover. He says, also, that he never takes to this place of business any box which has been used in case the corpse was of a person who had died of any contagious disease without first thoroughly cleansing the box. The defendant has also shown that on two occasions the drain referred to was so stopped up as to produce offensive odors, which were not perceived when the drain was open. So that, after the fullest consideration, my mind is led to the conviction that the odors complained of may have arisen from some other source than that alleged by the complainant. In other words, I am not satisfied that the defendant has conducted his business in such an unlawful manner as to cause any undue annoyance or discomfort to the complainant.

But the further contention, that the business itself is a nuisance, is of great importance, and cannot be passed by without the fullest consideration. The claim is that it is impossible to carry on a business of this character without constant liability to communicate diseases to those who reside in the neighborhood, and that this liability creates dread, discomfort, and apprehension, which abridges the rights of property. It is insisted that the deadly spore will, in spite of the utmost precaution, be carried about in such vessels, and are liable to be dislodged and to be communicated to the nearest inhabitant at any moment, impregnating them with the seeds of death.

In the first place, admitting the possibility of danger lurking in every box where the person buried therefrom has died of a contagious disease, what is the duty of the court? Should the court say that such business, however lawful, cannot be carried on in a populous part of the city? I am not prepared to assent to that doctrine. It is quite clear, to my mind, that this, like many other occupations, may be so conducted as to be a nuisance. For example, a grocer might allow his vegetables to decay in such quantities, and in such localities, upon his premises, as to do infinite harm to his neighbors, and subject him to the penalties of the law, or to the restraint of a court of equity. The same may be said of the vendor of meats; so negligent might he be as to scatter disease and death to multitudes. But because these things are possible, or may occasionally happen, it is not pretended for a moment that it is unlawful to carry on the grocery business, or to vend meats, in populous parts of our cities. It seems to me that the same reasoning may be applied, with great certainty, to the business of undertaking. It may be carried on so negligently, with such indifferent regard to the rights and feelings of others, as to be not only an offense to the tender sensibilities of the intelligent and refined, but to be a direct menace to the health and open violation of the civil rights of all residing in the neighborhood. Now, as, in the cases supposed, there is a remedy which does not go to the destruction of the occupation, but which at the same time protects the rights of others in the comfortable enjoyment of their property, so in the case in hand, it seems to me most clear that the court has it within its power to prevent the misapplication of a legal right,

and that to go further would be a destruction of that legal right. The law means to protect every one in the enjoyment of such rights,—in the enjoyment of his health, as well as in the enjoyment of his property, on the one hand: and, on the other, in the enjoyment of his legitimate vocations, as well as in the possession of his property. The defendant has a right to the possession of his property; and to carry on a legitimate business there in a lawful manner is an equally sacred right. Is the business in which the defendant is engaged a lawful one? To a certain extent that is not disputed. Has he a right to carry it on on the premises which he owns and occupies? He certainly has, unless it unreasonably interferes with the lawful rights of another. The counsel for the complainant, perceiving the force of this view, and what would be likely to result therefrom under the evidence, insisted, at last, that carrying on the business of an undertaker by the defendant was in itself so obnoxious to the complainant as to render his house uncomfortable, and that that fact alone was sufficient to justify this court in restraining the defendant from the use of his premises in carrying on said business. But it has not been shown that disease of any kind has ever been communicated by any act or omission of the defendant. It is not in evidence that the fatal spore has ever been allowed to remain in any of the boxes which the defendant and his employees have handled as children do their toys; nor does it anywhere appear that any special risk has been presented in the management of this business. Therefore, as to the first question, I must conclude that the complainant cannot prevail.

In the second place, it is urged that the business of an undertaker is a nuisance *per se*. Is this proposition maintainable? Must the undertaker retire from the inhabited parts of our villages, towns, and cities? Is an occupation which is absolutely essential to the welfare of society to be condemned by the courts, to be classified with nuisances, and to be expelled from localities where all other innocent and innoxious trades may be carried on? In other words, is this business so detestable in itself as unreasonably to interfere with the civil rights or property rights of those who dwell within ordinary limits, and who can and do, without effort, see and hear what is being done? The inquiry is not whether it is obnoxious to this or that individual or not;

but whether or not it is of such a character as to be obnoxious to mankind generally, similarly situated. There are certain obscene or offensive sights, certain poisonous or destructive gases or odors, certain disturbing sounds or noises, which affect most persons alike; can the business of an undertaker be classed with any of these? Is the business of an undertaker of this class? Before the court can condemn a trade or calling, it must appear that it cannot be carried on without working injury or hurt to another; and, as I have said, that injury or hurt must be such as would affect all reasonable persons alike similarly situated. The law does not contemplate rules for the protection of every individual wish or desire or taste. It is not within the judicial scheme to make things pleasant or agreeable for all the citizens of the State.

But to proceed with the case before me. Let us ascertain from what standpoint, or under what circumstances, the complainant regards this employment a nuisance *per se*. Mr. Westcott is one of the most highly respected citizens. He is about 72 years old. As to the subject-matter in hand, and everything akin to it, he is most sensitive or tender. It is conceded that he has an extraordinary horror or repugnance to contemplating anything pertaining to death or to the dead. Such emotions or feelings so control him that he has not attended a half-dozen funerals during his long life. As he advances in years, this sentiment becomes more and more intolerable. It is urged, and with great reason, that, these facts being so, Mr. Westcott's judgment is not only overcome by his imagination, but that innumerable evils are created thereby for his soul to feed upon, which he charges in this case to the defendant. Plainly, the circumstances are special, and most unsafe to found any general rule of law upon. Giving the complainant credit for all that he can possibly be entitled to, and keeping in mind what he actually suffers, whether justly or unjustly, whether it be the result of imagination or an oversensitive nature or not, and also keeping in mind the rights of the defendant, how far can the court go, with safety, in protecting Mr. Westcott in his *home*, and securing to him every comfort that a citizen is entitled to in the *enjoyment* of that home? Many observations which have been made in disposing of the first branch of the discus-

sion are equally applicable here; they will not be repeated. The court, in disposing of every such question, cannot but at once look beyond the judgment to be given in the particular case; the court cannot but inquire, what next, or where will such judgment lead to? The inquiry inevitably arises, if a decision is rendered in Mr. Westcott's favor because he is so morally or mentally constituted that the particular business complained of is an offense or a nuisance to him, or destructive to his comfort, or his enjoyment of his home, how many other cases will arise and claim the benefit of the same principle, however different the facts may be, or whatever may be the mental condition of the party complaining. One may complain of the smell of vegetables, another of fresh meats, another of the ordinary sound of the anvil, another of the running of a saw, or the humming of machinery, and the like, without limit; every case being as meritorious as the one now under consideration. Hence the value of general principles can never be lost sight of. A wide range has indeed been given to courts of equity, in dealing with these matters, but I can find no case where the court has extended aid, unless the act complained of was, as I have above said, of a nature to affect all reasonable persons, similarly situated alike.

My attention has been called to the case of *Railroad Co.* v. *Angel*, 41 N. J. Eq. 316. The principle there laid down is of great value in every such case. The defendant was engaged in a lawful business, but so used its tracks in making up its trains and distributing the cars in front of the complainants' dwelling that, by reason of stenches, noises, smoke, steam, and dirt thereby occasioned, the comfort of the complainants' home was seriously impaired. The court below allowed an injunction against such use of the road; but the court did not pretend to hold that the company must abandon the use of its tracks altogether. It was only decided that the company had no right to allow its engines or its cars to remain in the presence of or near by the house of the complainants, making hideous noises, emitting smoke and steam, and unwholesome odors, to the great discomfort of the complainants in their home. The judgment of the court simply looked to the proper exercise of the lawful rights of the defendant, and, in the lawful exercise of those

rights, what inconvenience or annoyance the complainants might suffer they must submit to. Engines in passing might whistle or emit smoke, steam, and dirt, cattle might bellow, sheep bleat, and hogs squeal, but to that extent the complainants must yield to the general demand. To this extent the court was sustained on appeal. I can find nothing in that case to lead me to say that the business of an undertaker is a nuisance *per se.*

My attention has also been directed to *Cleveland* v. *Gas Light Co.*, 20 N. J. Eq. 201, in support of complainant's views. In that case, the court held: "Any business, however lawful, which causes annoyances that materially interfere with the ordinary comfort, physically, of human existence, is a nuisance that should be restrained. * * * To live comfortably is the chief and most reasonable object of men in acquiring property as the means of attaining it; and any interference with our neighbor in the comfortable enjoyment of life is a wrong which the law will redress. The only question is, what amounts to that discomfort from which the law will protect?" The learned chancellor then made this important observation: "The discomforts must be physical; not such as depend on taste or imagination. But whatever is offensive, physically, to the senses, and by such offensiveness makes life uncomfortable, is a nuisance; and it is not the less so because there may be persons whose habits and occupations have brought them to endure the same annoyances without discomfort." For a strikingly similar definition, see *Walter* v. *Selfe*, 4 Eng. Law & Eq. 15.

In this case, then, we have the broad, yet perfectly perceptible or tangible, ground or principle announced, that the injury must be *physical*, as distinguished from purely *imaginative.* It must be something that produces real discomfort or annoyance through the medium of the senses; not from delicacy of taste or a refined fancy. This is very comprehensive; indeed, I cannot conceive of a more liberal or broad statement of the law; yet I apprehend it is a true delineation of the law. How, therefore, shall I apply this rule? I must find that physical discomfort has been produced, or will be; but, in so doing, I must not forget the influence of the imagination or a morbid or abnormal taste on the mind and body. What has been disclosed by the proof? These facts: Mr. Westcott and the defendant

have lived side by side, in these same houses, for about eleven years. During all this time the latter has carried on this business of burying the dead, in about the same open and unpretentious manner that he now does. There is no evidence that Mr. Westcott or any other person has even been afflicted by reason of the defendant's occupation; indeed, nothing has been attempted in that direction. Yet it is admitted that this trade has been and is carried on by the defendant in the midst of the most populous part of the city of Camden. And what, to my mind, is of very great consequence, in considering whether this trade affects the body of Mr. Westcott through what is known as the bodily senses, or through his imagination or taste, is the fact that not another person has been produced who has been affected as he has been. As just stated, great numbers, from day to day, look out upon this establishment just as Mr. Westcott does, although at a greater distance; but, if the injury results from *seeing* these evidences of the havoc of disease and of death, then, surely, distance cannot mitigate it, and, while so many others have been subject to the same influences, not one has been offered to say that he has suffered any annoyance or discomfort by the presence of this employment in the neighborhood; and, although the business of undertaking, caring for, and burying the dead, has been conducted in about this same manner from the earliest times (that is, in an open and public manner, in the town and city, as well as in the country), and so continues to be, where the most refined and cultivated abide, as well as where the unpretentious do, yet from no class has any one been brought to testify to any bodily or mental injury or suffering because an undertaker was carrying on his vocation in his neighborhood.

Hence, in my judgment, before a trade or business can be declared to be a nuisance *per se*, it must be made to appear that it necessarily works injury, discomfort, or annoyance to the property or persons of citizens generally who may be so circumstanced as to come within its influence. It is not enough that only one person, and that one the complainant, alleges discomfort; and certainly his case is greatly weakened when he admits that so sensitive is he on the subject that in 72 years he has not attended a half-dozen funerals. If the court can compel this

defendant to cease his trade next door to Mr. Westcott, because the sight of these instruments used in burying the dead have an unhealthy influence on his mind, then the vendor of crape, and the artist who cuts tombstones and monuments, will inevitably be liable to the same condemnation. See *Demarest* v. *Hardhan*, 34 N. J. Eq. 469, 474.

Perhaps I ought to remark that the case of *Barnes* v. *Hathorn*, 54 Me. 124, so much relied on by counsel of the complainant, rested on a very different state of facts, in this; that there was not only a tomb on the land of the defendant within 44 feet of the dining-room of the plaintiff, but that at the time of the action the defendant had a dead body in it, and it was shown that once before it had six deposited therein, and that experts swore that effluvia injurious to health escaped therefrom. Nor is the case of *Clark* v. *Lawrence*, 6 Jones, Eq. 83, in any sense like the one before me.

The results of my inquiries are that while the defendant has no right to conduct his business so as to endanger or threaten the health of the complainant, or to make his home uncomfortable, either by filling the air with noxious vapors, or the germs or seeds of disease, the evidence does not show that he has done either, and that the business of an undertaker is not a nuisance *per se*. The bill should be dismissed, with costs.

As the injunction in restraint of nuisances, under their manifold forms, is, principally, a means whereby men can rid themselves of unpleasant sights and sounds and other sensual impressions, it seems that the history of this branch of jurisprudence must throw much light on the relative degrees of progress in civilization, between the time when the injunction was first invoked to restrain nuisances, and the present day. While the limits of a note are obviously too narrow to permit anything approaching a satisfactory examination of this subject from the point of view just indicated, yet it seems possible, even within such limits, to gather together, at least, a few data in illustration.

And first it must be noticed that, however much the men of any one epoch differ from each other in certain respects, yet that there are always along with these differences certain phenomena in which they all agree. Whence it follows that those men to whose lot it falls to administer the law, whether their authority come from the king or from the people, must, in certain respects, be in accord with their fellows.

Without voyaging far on the sea of psychology, it may be said that the differences between men at any one time consist generally in slight individual peculiarities, while the resemblances between them consist, generally, in opinions and tastes and

habits having their origin deep down in their being. When, therefore, the courts, at any given time, deliver themselves of their judgments upon the various subjects that come before them for their decision, they utter, not only their own individual opinions, but, in addition, the general sentiment of the community as it exists at such time; in other words, the degree of civilization then and there subsisting. In the case under review, the court takes the ground that "the injury must be *physical*, as distinguished from purely *imaginative*. It must be something that produces real discomfort through the medium of the senses; not from delicacy of taste or a refined fancy." (The above italics occur in the opinion.) While it is, no doubt, pardonable in ordinary oral discourse, to distinguish the *imaginative* from the *physical* by giving to the former term the meaning of *unreal*, and to the latter, the meaning of *real*, yet, in such a solemn opinion as the judgment of a court, it does not seem unreasonable to look for a more careful use of language.

That the court uses the two adjectives in their colloquial signification, is evident from the second of the two clauses quoted above, for the court distinguishes between discomfort produced "through the medium of the senses" and that produced by "delicacy of taste or a refined fancy."

Is the distinction well taken? Unless the great majority of philosophers are completely at fault, it is certain that the dictum: "*Nihil est in intellectu quod non prius fuerit in sensu*" is valid; and, if this be so, any distinction between discomfort produced through the medium of the senses, and discomfort produced by delicacy of taste is, perhaps, not quite palpable; for it, certainly, is part of the alphabet of psychology that the imagination not only never does, but that it never can act without some mediate or immediate sensible excitement. Hence, to permit certain actions on the ground that they produce effects only *imaginative*, and to forbid certain other actions because they produce *physical* effects, seems rather like being moved thereto by something quite as unreal as the court apparently considers the imagination.

In the case of *Cleveland* v. *Gas Light Co.*, cited in the principal case, it will be observed that the same distinction is taken between things *physical* and things *imaginative*, and in that case, as well as that of *R. R. Co.* v. *Angel*, the alleged nuisances affected the nose and the ears. As it can scarcely be suggested that any one of the senses is more than a channel through which information is given to the intellect of man concerning material existences outside of himself, it follows that it matters very little, if at all, through which of the senses such information may come.

To apply the foregoing remarks to the present case will require a rather minute examination of its facts and of the opinion of the court.

It may be assumed at the outset that the odors complained of by the plaintiff did not arise from the boxes used by the defendant, and this confines the investigation to the spectacle that was presented in the defendant's back yard. As to the danger resulting from the cleansing of the boxes in which corpses had been preserved, it may be said that there is sufficient uncertainty to render a positive opinion one way or the other almost impossible; and, according to the well-known principle, the defendant should not be disturbed in his business on that account.

There remain but two questions to

be considered: first, whether the alleged injury was physical; and, second, whether the business of an undertaker, or, rather, the exhibition of his paraphernalia, is tolerable in the midst of a populous town.

As to the first question, the mere proposing of it seems to furnish its answer. The court, after stating that the complainant is "one of the most highly respected citizens," adds that "he is about 72 years old," and that upon the subject of death he is "most sensitive and tender."

To assert that a man is of any given age may be, of course, very proper; for the verification of the fact is, generally, quite simple. But after the fact is established, what does it amount to? Does the law say that a man of advanced age has less right to claim its protection than one that has youth on his side? If not, then whether the complainant were 72 or 22 makes no shadow of a difference, unless his age had so impaired his faculties as to make him incompetent to form correct conclusions; and this is not even suggested. Again, unless impressions received through the eyes are to be considered "imaginative" as distinguished from "physical," the injury charged here would seem to answer to any known definition for the latter term, for what the plaintiff distinctly objects to is something quite objective to himself, and of whose existence he is made aware only through the medium of his eyes. Surely nothing more need be said in answer to the suggestion that the injury complained of in this case is not "physical."

The court, furthermore, urges as an obstacle in the way of granting an injunction, that the complainant is hyper-sensitive on the subject of death, and as an evidence of his morbid condition the court notices "that he has not attended a half-dozen funerals during his long life."

Undoubtedly, courts cannot gratify the abnormal desires of morbid persons, but is an indisposition to attend funerals an irresistible evidence of morbidity? Do healthy men ordinarily show an alacrity for such diversion?

Even admitting that the two questions just proposed may be answered in the affirmative, these answers have no bearing on the present case, for the complainant is not seeking an injunction to restrain any persons from compelling him to attend funerals; but what he seeks is that a certain spectacle may be removed from his sight, which probably few persons not connected with the business of funeral directors can regard with entire complaisance.

The court further says that no other persons have objected to the defendant carrying on the operations under discussion, except the complainant. Two very plain considerations arise in answer to this proposition; first, that the parties to this controversy occupy contiguous properties, and, second, that whether or not any given person objects to any alleged nuisance, is largely dependent upon that person's refinement and energy.

His next door neighbor has a rather better view of what goes on in one's back yard than a person residing at a greater distance; and, what would afford delight to some, would shock a man of refinement. It may be said that there is no such question here. But it is true that many a man endures much before he ventures on a lawsuit.

This seems a fitting point at which to examine the remarks of the court on the broad question, whether "the business of an undertaker is a nuisance *per se*."

At the very threshold of the inquiry, the court proposes a query that suggests an answer to the above question, as though the question were distinctly simple, and susceptible of an unequivocal affirmation or negation. But, assuming for the moment, that the exhibition of the various implements used by undertakers in the prosecution of their trade is of such a character as to cause positive annoyance to the person under whose observation it falls, it by no means follows that the business cannot be carried on in a populous community; for it might either be done under cover, or, if that were impossible, the undertaker might have his office where he pleased, and have the various functions of his trade performed at some distance from dwellings.

The court further remarks: "The inquiry is not whether it (the business) is obnoxious to this or that individual or not, but whether or not it is of such a character as to be obnoxious to mankind, similarly situated. There are certain obscene or offensive sights, certain poisonous or destructive gases or odors, certain disturbing sounds or noises, which affect most persons alike; can the business of an undertaker be classed with any of these?"

As to the first proposition, that any given series of acts must be obnoxious to men in general, and not to certain abnormal specimens of the race, in order that a court may declare it a nuisance, there can be no dissent; but it scarcely seems entirely pertinent to inquire, as the court does inquire further on, "how many other cases will arise and claim the benefit of the same principle, however different the facts may be, or whatever may be the mental condition of the party complaining?"

If the principle be just, what matter it whether there be few or many persons claiming its protection?

If the facts be different, it does not seem very clear how the principle can be invoked; and, if the mental condition of the party claiming it be abnormal, one would think that that fact, in itself, would furnish a sufficient answer to the claim.

But to return to the question, which may be re-stated as follows: Is it a nuisance for an undertaker, carrying on his business in the residence section of a city, to exhibit in his back yard, directly in view of his next door neighbor, the process of manufacturing boxes for the reception of dead bodies, to wash such boxes after they have been so used, and, in a word, to show forth the means whereby an undertaker pursues his calling?

Looking at the question in the abstract, it will be assumed as a general principle that, as men become more civilized, the sight of death, or what suggests death, is distinctly painful; while to the savage, the sight of death is a powerful stimulus to his bloodthirsty passions.

Hence it would seem to follow that, if the law be the reflection of the state of civilization, at any given time, it must condemn to-day what, perhaps, it tolerated, or even encouraged, yesterday.

Therefore, if the general sentiment of a community is opposed to any given trade under given circumstances, the law should declare such trade under such circumstances not permissible.

While, undoubtedly, many, if not most, sub-divisions of jurisprudence may be brought under the principle *stare decisis*, yet such branches of the law must obviously deal very largely with cases whose circumstances and whose facts have varied from each

other but little from the first; but it is submitted that nuisance cannot be considered as a branch of this sort, for if the view here presented be just, what might have been eminently proper fifty years ago, may be eminently improper to-day, and this for the reason that, with the development of man, as a being endowed with an intellect and a will, his intellect discerns more clearly the really desirable way, and his will desires it more ardently than he did in the past.

Therefore, to argue that, because any given act was tolerated in the past it should still be permitted, is to argue to very little purpose, save only where such act falls distinctly under some principle of morals, which, from their very nature, must be eternal.

But the question, is this or that act a nuisance, in the vast majority of cases, amounts to nothing as a problem in morals, but is simply reduced to another question,—is this or that act agreeable to the average sentiment, not only of the community in general in which it occurs, but, still more, of the members of that community under whose notice it takes place.

If any other criterion be adopted in cases of this sort, no one can have redress for the most revolting sights or sounds, unless either they are opposed to good morals, or they are brought under the notice of more than one or two persons.

It has frequently been announced by the courts, that a thing may be a nuisance in one place that would not be so in another: *Ball* v. *Ray*, L. R., 8 Ch. App. 471; *Brode* v. *Saillard*, L. R., 1 Ch. D. 692; *St. Helen's Smelting Co.* v. *Tipping*, 11 H. L. Ca. 650; *Rhodes* v. *Dunbar*, 7 P. F. Sm. 287; *Bishop* v. *Banks*, 33 Conn. 118; *Appeal of Ladies' Decorative Art Club*, S. C. of Pa., April 23, 1888, and it seems to be a fair inference from this, that, if a thing be the source of discomfort to any man by reason of its exciting within him feelings that he has a right not to anticipate under the circumstances, such thing is distinctly a nuisance.

Although, as has been already suggested, the principle *stare decisis* cannot exert a controlling influence in cases such as the one under discussion, yet, as *indicia* of the drift of judicial—and, therefore, public—sentiment upon the question of private nuisance, it seems fitting that the present note should conclude with a reference to one or two decisions on the subject.

The court, in the present case, refers to *Walter* v. *Selfe*, 4 Eng. Law and Eq. 15, as supporting its distinction, between things *physical* and things *imaginative*. The essential facts of that case were that the plaintiff, Walter, was the owner of a parcel of land, laid out as a garden or pleasure-ground, and upon which was situated his dwelling. The defendant, Selfe, erected a brick manufactory on land adjoining plaintiff's, from which manufactory emanated certain odors and vapors of which the plaintiff complained. Upon the question whether the odors and vapors in question were noxious to human health, KNIGHT BRUCE, V. C., uses the following language: "I do not say, nor do I deem it necessary to intimate any opinion, for it is with a private, and not a public, nuisance that the defendant is charged. * * * Ought this inconvenience to be considered, in fact, more than fanciful, or as one of mere delicacy or fastidiousness?" and the answer is in the affirmative. Here is no such distinction as the court in the present case proposes between things *physical* and

things *imaginative*. The Vice Chancellor dismisses, as a matter of no consequence in the case before him, the question of health, because of the incontestable right of every man to be protected in the comfortable enjoyment of his home.

Mr. Addison, in his work on Torts (6th ed., p. 366), says of the exercise of a trade lawful in itself: "The spot may be very convenient for the defendant or for the public at large, but very inconvenient to a particular individual, who chances to occupy the adjoining land; and proof of the benefit to the public from the exercise of a trade in a particular locality can be no ground for depriving any individual of his right to compensation in respect to the particular injury he has sustained from it."

Mr. Wood, in his work on Nuisances, p. 575, speaking of what constitutes a nuisance in any particular case, says: "It is a matter of small consequence at law, whether it has ever been held a nuisance before or not; if it amounts to an actual invasion of another's right, it is actionable, even if it has never previously been the subject-matter of an action. At law, every case stands or falls upon its own merits, and if the special facts establish the nuisance, it will be so held, although never so held before."

In the case of *Snyder et al.* v. *Cabell et al.*, decided November 13, 1886, by the Supreme Court of Appeals of West Virginia, the bill was filed by plaintiffs to enjoin the defendants from carrying on a skating rink within a short distance of plaintiffs' dwelling-house. One of the grounds upon which the bill rested, was the noise emanating from the rink, and the court, in granting the injunction, remarks: "We base the propriety of the injunction on the noise alone."

Among the cases cited by the West Virginia court, in support of its opinion, is that of *Catlin* v. *Valentine*, 9 Paige, 575, it which it was decided that it is not necessary that the business complained of should endanger health, but that "it is sufficient if it produce that which is offensive to the senses, and which renders life and property uncomfortable." Another case relied on by the court is that of *Crump* v. *Lambert*, L. R., 3 Eq. 409, which, according to the court, decided: "that smoke, unaccompanied with noise or with noxious odors, noise alone, and offensive odors alone, although not injurious to health, may severally constitute a nuisance. The material question in all cases is whether the annoyance produced is such as materially to interfere with the ordinary comfort of human existence."

The case of *Rogers* v. *Elliott*, Supreme Judicial Court of Massachusetts, March 2, 1888, was an action of tort to recover damages for the ringing of a church bell in Provincetown, Massachusetts. The facts of the case were, briefly, these: the plaintiff, Rogers, whose house faced the church of which the defendant, Elliott, was pastor, was ill from a stroke of the sun, and during this illness the plaintiff was thrown into convulsions whenever the bell was rung. The defendant having been requested to stop the bell ringing and having refused to accede to the request, the plaintiff on his recovery brought this action.

In the court below the judge directed the jury to find a verdict for the defendant, which direction was sustained by the Supreme Judicial Court on the broad ground that nothing can be a nuisance that affects only persons in an abnormal condition of mind or body. The court, how-

ever, KNOWLTON, J., delivering the opinion, uses the following language that seems to apply very directly to the case under review, viz.: the question of nuisance or no nuisance depends upon "the effect of noise upon people generally, and not upon those, on the one hand, who are peculiarly susceptible to it, or those, on the other, who, by long experience, have learned to endure it without inconvenience; not upon those whose strong nerves and robust health enable them to endure the greatest disturbances without suffering, nor upon those whose mental or physical condition makes them painfully sensitive to everything about them." The court likewise quotes from a portion of the opinion of the Vice-Chancellor in the case under review, *assuming* that in this case the plaintiff was in an abnormal condition.

Of course, *mutatis mutandis*, noise and unpleasant sights stand on the same plane.

WILLIAM REHN CLAXTON.
Philadelphia.

Supreme Court of Missouri.

NOE ET AL. *v.* KERN ET AL.

Where a wife bequeathed all her property to her husband, "in the full faith that 'he' will properly provide for the two children of my deceased brother * * * whom we have undertaken to raise and educate:" *Held*, that a trust was created in favor of the children, and that in consideration of their frail health and helpless condition, an award of $9,000 for their education and maintenance was not excessive.

APPEAL from St. Louis Circuit Court; DANIEL DILLON, Judge.

This is a suit in equity, instituted by Paul and Sadie Noe, through their curator, John Wickham, against Robert H. Kern, administrator *de bonis non* of the estate of Virginia C. Ferguson, deceased, and Horace Ghiselin, administrator of the estate of William F. Ferguson, deceased, to charge the property in the hands of the administrator of the estate of Virginia C. Ferguson with a trust which plaintiffs claimed was created in their favor by virtue of the last will and testament of the said Virginia C. Ferguson. There was a verdict for plaintiffs, and defendants appealed.

Given Campbell and *H. D. Laughlin*, for appellants.
Collins & Jamison and *John Wickham*, for respondents.

The opinion of the court was delivered by

NORTON, C. J.—This is a proceeding in equity which calls